1992

Fred Broadbent v. Industrial Commission of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FRED BROADBENT,	)	
	)	
Applicant,	)	
vs.	)	COURT OF APPEALS
	)	
INDUSTRIAL COMMISSION OF UTAH,	)	Case No. 920409-CA
	)	
	)	Priority 7
Defendant.	)	
	)	

BRIEF OF APPELLANT

APPEAL TAKEN FROM A DECISION OF THE
INDUSTRIAL COMMISSION
STATE OF UTAH

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JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Article VIII, section 5 of the Utah Constitution, and Utah Code Ann. §§ 78-2a-3 (2)(a) (1990) 35-1-82.53 (2) (1988), 35-1-86 (1988), and 63-46b-14 (1988). This is an appeal from part of a final order wherein the Utah State Industrial Commission determined that Petitioner Fred Broadbent ("Broadbent") suffered an industrial injury on October 6, 1982. Due to conflicting medical opinions the Administrative Law Judge, Timothy Allen, ("ALJ") referred Broadbent to a medical panel. On December 10, 1991, a medical panel determined that Broadbent had a twenty-three percent (23%) impairment rating due to the accident. However, the ALJ ordered that interest be paid only from December 23, 1991. On May 29, 1992, the Industrial Commission affirmed the ALJ's order. A Petition for Review was timely filed on June 23, 1992.

STATEMENT OF THE ISSUE PRESENTED ON APPEAL

Did the Utah Industrial Commission err in choosing December 23, 1991 as the starting date for interest on an award for an injury on October 6, 1982, where the applicable statute provides for interest from the date when the benefit would have been payable but for the dispute and when the insurance carrier had use of Mr. Broadbent's money for an extended time?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

A statute found in Utah Code Ann. §35-1-78 (1988) and Rule 490-1-12(b) (Utah Admin. Code 1991) are dispositive of this appeal.

STATEMENT OF THE CASE

Mr. Broadbent suffered an industrial accident on October 6, 1982. (R. 1, 59) He was released to return to work on June 9, 1983. (R. 186) The insurance carrier paid temporary total disability payments ("TTD") through the same day. (R. 14) Over the next few years Mr. Broadbent received several impairment ratings from various doctors. (R. 186, 225, 231, 262, 286, and 160) The differences in medical opinion and inability of the parties to agree necessitated the appointment of a medical panel. (R. 59)

On December 10, 1991, the medical panel determined that

Broadbent had a twenty-three percent (23%) impairment rating. (R. 56) On March 9, 1992, the ALJ entered his Order awarding Broadbent a twenty-three percent (23%) permanent partial impairment rating. (R. 59-61) However, the ALJ ordered defendants to pay interest at 8% only from December 23, 1991. (R. 59-61)

Broadbent disputed the ALJ's order concerning the award of interest.[1] (R. 64-68) He filed a timely Motion for Review. (R. 64-68) On May 29, 1992, the Industrial Commission affirmed the ALJ's order. (R. 113-120) Broadbent then timely filed this appeal. (R. 123)

STATEMENT OF FACTS

Broadbent sustained a serious back, shoulder, neck, and rectum injury in an industrial accident on October 6, 1982 while employed by Tolboe Construction Company, which was insured by Industrial Indemnity. (R. 1, 59) Richard M. Thomas, M.D., was one of Broadbent's treating physicians. He performed the necessary surgery following the accident. Dr. Thomas referred Broadbent to Douglas B. Kirkpatrick, M.D. for additional treatment. (R. 222)

Broadbent had been receiving chiropractic care from Dr. Kelly B. Jarvis, B.S., D.C. prior to the industrial accident. After the industrial accident he continued to see Dr. Jarvis, who also treated him for the industrial accident. Dr. Jarvis cleared

[1] Interest is calculated at eight percent (8%) per annum. Mr. Broadbent's PPD weekly amount was $189.00. When his last PPD payment was due on October 27, 1984, Mr. Broadbent was owed $13,562.62 in PPD payments and $460.33 in interest. Therefore, on October 27th every following year, Mr. Broadbent was owed $1,085.00 in interest. Interest was due until approximately August 17, 1992 when defendant's tendered the amount ordered by the Industrial Commission. Broadbent will be owed an approximate total of $8,929.66 in interest.

Broadbent for work as of June 9, 1983. (R. 186) Defendants paid TTD through June 9, 1983. (R. 14) Following medical treatment, Broadbent returned to work on September 1, 1983. (R. 10)

Dr. Kirkpatrick, a neurosurgeon, gave Broadbent a twenty percent (20%) impairment rating on April 23, 1984. (R. 225) The record is silent as to why this case did not settle at the 20% impairment rating. Dr. Kirkpatrick then gave Broadbent a five percent (5%) rating on September 5, 1984. (R. 231)

Bruce F. Sorenson, M.D., a neurosurgeon, was also one of Broadbent's treating physicians. Dr. Sorenson gave Broadbent a sixteen percent (16%) impairment rating on May 26, 1987. (R. 262) The record is silent as to why three years transpired between Dr. Kirkpatrick's impairment rating and Dr. Sorenson's impairment rating.

Broadbent wanted a second opinion so he went to Milton D. Thomas, M.D. On February 2, 1988 Dr. Thomas gave Broadbent an impairment rating of fifteen percent (15%). (R. 286) Broadbent felt that he was more seriously impaired than either Dr. Thomas' or Dr. Sorenson's impairment ratings.

On June 4, 1987, defendants tendered an offer of settlement for the sixteen percent (16%) impairment rating. (R. 14) However, because Broadbent correctly believed he was more seriously impaired, he rejected the offer.

On or about August 30, 1990 Broadbent retained the services of the law firm of Sykes and Vilos. Broadbent was then evaluated by John M. Bender, M.D., a physiatrist, who gave him an

impairment rating of thirty-four percent (34%) on September 18, 1990. (R. 160) Dr. Bender's rating included a twenty-four percent (24%) impairment for physical disabilities. (R. 160) Because Broadbent was experiencing Parkinson-like symptoms, Dr. Bender included a twelve percent (12%) permanent physical impairment rating. (R. 160) Broadbent then offered to settle for the twenty-four percent (24%) impairment rating. (R. 15-16) Defendants refused this offer.

On December 10, 1991, a medical panel, ordered by the Industrial Commission, awarded Broadbent a twenty-three percent (23%) impairment rating. (R. 56) The medical panel stated that the Parkinson-like symptoms were not a result of the industrial accident. (R. 55-56) On March 9, 1992 the ALJ, in his Order, adopted the medical panel's impairment rating of twenty-three percent (23%). (R. 59-61) Judge Allen also ordered Broadbent's compensation to be paid in a lump sum plus eight percent (8%) interest per annum from December 23, 1991. (R. 59-61)

Broadbent filed a Motion for Review on the payment of interest. (R. 64-68) On May 29, 1992 the Industrial Commission affirmed Judge Allen's Order. (R. 113-120) The Commission stated:

> The respondents argue that the ALJ was correct in ordering that interest on the PPD award commenced on December 23, 1991 since that was the date that the liability of the respondents was first medically determined. We agree with the respondents on this issue.

Petitioner timely filed his Petition for Review. (R. 123)

SUMMARY OF ARGUMENT

The commission failed to correctly interpret and apply Utah Code Ann. §35-1-78 (1988) and Rule 490-1-12(b) (Utah Admin. Code 1991). Consequently, it erroneously selected December 23, 1991 as the date when Broadbent's benefits became due and payable.

Broadbent was released to return to work on June 9, 1983. This ended his temporary total disability (TTD), and began his permanent partial disability (PPD).[2] Therefore, a correct reading of the above Statute and Rule would mean that Broadbent's benefits became due and payable the next day. Consequently, interest should have been awarded from June 10, 1983, until the benefits were paid.

ARGUMENT

Standard of Review

The issue on appeal is a question of law. In considering a question of law, the reviewing Court affords no deference to the Industrial Commission's legal conclusions. Rather, this Court employs a correction-of-error standard. Hurley v. Industrial Commission, 767 P.2d 524, 527 (Utah 1988). This Court must closely scrutinize the Commission's order to determine whether the appropriate legal principles were applied when the commission

[2]Broadbent received temporary total disability payments from February 17, 1987 to and including March 8, 1987 and from August 14, 1986 through and including August 27, 1986. This is 6.875 weeks. Naturally, interest would not accrue on the PPD during those few weeks. Consequently, Mr. Broadbent's interest would be reduced by $143.45.

failed to award interest before December 23, 1991, pursuant to Utah Code Ann. § 35-1-78.

POINT I

DID THE UTAH INDUSTRIAL COMMISSION ERR IN CHOOSING DECEMBER 23, 1991 AS THE STARTING DATE FOR INTEREST ON AN AWARD FOR AN INJURY ON OCTOBER 6, 1982, WHERE THE APPLICABLE STATUTE PROVDES FOR INTEREST FROM THE DATE WHEN THE BENEFIT WOULD HAVE BEEN PAYABLE BUT FOR THE DISPUTE AND WHEN THE INSURANCE CARRIER HAD USE OF APPLICANT'S MONEY FOR AN EXTENDED TIME?

Utah Code Ann. § 35-1-78 establishes when interest is to be paid:

> Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable. (Emphasis added)

Id. The Utah Supreme Court in Crenshaw v. Industrial Commission of Utah, 712 P.2d 247 (Utah 1985), stated:

> Interest on each payment when due is not intended as a penalty or punishment for the refusal to pay. The interest is charged to the employer's use of someone else's money. The claimant is unable to make any use of the money and the value of the benefit is diminished when payment is delayed. Any such delay in payment inevitably results in the claimant subsidizing the employer's insurer. By Statute, interest must be paid on each benefit payment which comprises an award from the date the payment would have otherwise been due and payable. (Emphasis added).

Id. at 250.

Furthermore, § 35-1-78 applies retroactively. In Marshall v. Industrial Commission 704 P.2d 581 (Utah 1985), the

Supreme Court stated:

> Thus, it is clear that compensation for worker disability is legislation for the public welfare. It is also clear that the statute providing for interest on unpaid benefits was a legislative attempt to remedy a serious social problem: the depreciation of the value of benefits as a result of non-receipt of the weekly benefit for months, or perhaps years, until a final determination of eligibility and an award are made. To effect this purpose, the legislature could only have intended this remedy to apply to as broad a range of awards as possible. (Emphasis added).

Id. at 583.

These cases teach several important principles: for example, interest on the award is mandatory, even though it is "years [before] ... a final determination of eligibility .... [is] made." Also, the social reasons for interest include: compensation to the employee for the "employer's use of someone else's money"; establishing a disincentive for employer's delay; and preventing the injustice of "the claimant subsidizing the employer's insurer."

The only question to be answered, here, is when did Broadbent's benefits "otherwise become due and payable?" The Commission ruled:

> interest . . . [should] commence on December 23, 1991 since that was the date that the liability of the respondents was first medically determined. (Emphasis added).

(Exhibit A). The Commission claims reliance upon Rule 490-1-12 (Utah Admin. Code 1991). However, that rule actually states:

> For the purpose of interest calculation, benefits shall become "due and payable" ... as follows:
>
> . . .

> 2. Permanent partial compensation shall be due and payable on the next day following the termination of temporary total disability. However, where the condition is not fixed for rating purposes, the interest shall commence from the date the permanent partial impairment can be medically determined.

Id. (Emphasis added). The day following termination of TTD was June 10, 1983. Broadbent was given a twenty percent (20%) impairment rating from Dr. Kirkpatrick on April 23, 1984. Therefore, on April 24, 1984, the condition was "fixed [medically] for rating purposes" as of that date, although the parties disagreed on the rating.

The Commission focused on the less applicable language in the second sentence of Rule 490-1-12(2) which states, "where the condition is not fixed for rating purposes", (Emphasis added) but ignored the most applicable first sentence. Even if the second sentence applies, the Commission erroneously decided that the medical panel's 23% impairment rating began with the date that the liability of the respondents was first medically determined. However, the second sentence of Rule 490-1-12(2) clearly provides that interest liability accrues "from the date the permanent partial impairment can be medically determined" (Emphasis added) not when it was determined. This sentence takes effect only "where the condition is not fixed for rating purposes". This must have reference to the medical "condition" not being "fixed" or stable for rating purposes. Under such conditions, it would clearly be unjust to impose interest on the employer, who is probably paying TTD anyway. Where the medical condition is not stable, the second

sentence of sub§(2) kicks in and says that interest commences from the date that permanent partial impairment "can be medically determined".

The second section of sub§(2) clearly does not come into play in this case. The record shows that Mr. Broadbent was cleared to return to work on June 9, 1983 and the temporary total disability payments ended on that day. By defendant's own admission on the compensation agreement, the TTD ended on June 9, 1983. Under the Commission's own rule, that constituted "termination of temporary total disability" and his "permanent partial compensation shall be due and payable on the next day following ...".

It is not uncommon for doctors to award varying impairment ratings. In fact, Broadbent was given disability ratings on the following dates: April 23, 1984 (20%); September 5, 1984 (5%); May 26, 1987 (16%); February 2, 1988 (15%); September 18, 1990 (24%); and December 23, 1991 (23%). Broadbent's permanent partial impairment not only could be, but <u>was</u> medically determined <u>five times</u> before the medical panel's rating! However, the date that the amount of permanent partial impairment <u>was determined</u> is not the standard set forth in the statute or the rule. The statute, anticipating occasional disputes between employees and insurance companies, provides that interest accrues "from the date when each benefit payment would otherwise have become due and payable". Since that cannot always be determined prospectively, "otherwise" must refer to a contemplated,

retrospective determination. It is the only way it makes sense. With that interpretation, no matter when the amount of PPD is ultimately decided, the claimant is entitled to interest from the date that the PPD should have been paid but for the dispute. In other words, but for the dispute over the amount, the payments would have "otherwise become due and payable" on the day following the termination of TTD. In Broadbent's case, but for the dispute and the delay, his benefits would have been "otherwise ... due and payable" on the day following the termination of his TTD. This date was June 10, 1983. Therefore, Broadbent is owed interest from June 10, 1983, the day following his first impairment rating.

The commission ignores the Supreme Court's explanation of § 35-1-78. As shown above, insurance carriers must pay interest when they have the use of an employee's money. Also, "[a]ny such delay in payment results in the claimant subsidizing the employer's insured." Crenshaw, at 250. Furthermore, the Utah Supreme Court stated that the employee's benefits must include interest even if it takes years "until a final determination of eligibility and an award are made." Marshall, at 583.

This case is similar to Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990). In Heaton, the applicant was injured in 1975 and applied for permanent total disability in 1978. The ALJ did not rule on the application for permanent total disability. The employer's insurance carrier liability expired October 5, 1981. They had been making all of their liability payments to Heaton. Id. at 677. In 1981 Heaton wrote a letter for clarification

concerning his claim. The ALJ replied that Heaton should get a report from a physician stating Heaton was unable to work and that his condition had worsened. In 1985 Heaton submitted a letter from Dr. McNaught that supported his claim. It also stated that Heaton had not recovered from surgeries performed in 1976 and 1977. Despite this, the ALJ and the commission determined Heaton was totally disabled from the date of Dr. McNaught's examination, July 25, 1985. The Utah Supreme Court reversed, ruling that Heaton was totally disabled from October 6, 1981. Heaton, at 682. The Court then awards interest on all benefits from October 6, 1981, when the second injury fund should have started making payments. Id. at 677.

The claimants interpretation of the statute and rule is consistent with the Utah Supreme Court cases that have addressed the issue. This interpretation also has a salutary and just effect on industrial relations. Consider the lopsided advantage for the employer and the insurance company if the rule was any other way. The employee receiving an on-the-job injury must go through the Workers Compensation system, with access of the courts being prohibited under normal circumstances. In that system, he encounters sophisticated insurance companies, whose lawyers are very knowledgeable about the act and adroit at finding loopholes. If the applicant even has an attorney (and many do not), there are relatively few claims attorneys who have substantial knowledge

about the Workers Compensation system.[3] If this court establishes a judicial interpretation that allows interest to begin only when the final determination of a disputed PPI claim is made, then employers and the insurance companies will have little incentive to see that claims are promptly and resolutely determined. It will reward an employer or insurance company's unjust delay, since the insurance company will have use of the employee's money for investment purposes, without paying any interest. Such a ruling would also have some very subtle - but deleterious - effects. It would lead to a "hard-ball" attitude in bargaining that would be hard for the insurance company adjusters and representatives to resist. On a closed issue, they could simply tell the claimant to "go jump in the lake", forcing the claimant to file for a hearing and lose substantial interest. If upheld, the Commission's interpretation would be bad for industrial relations.

The defendant may say that this case is "different" because Mr. Broadbent was allegedly hard to deal with. Defendant's may imply that it is partly Broadbent's own fault that this matter has not been resolved sooner because he wouldn't take reasonable offers, and that he allegedly made no effort to have his attorney bring it to a head.[4] These ingenuous arguments ignore important facts and disregard the main issue. Perhaps if Mr. Broadbent were as sophisticated as the insurance company attorneys, he should be

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[3] 1991-2 Yellow pages has approximately 34 listings for Workers Compensation attorneys, many of which are defense law firms.

[4] Mr. Broadbent actually had three counsel of record at various times.

held to a different standard. However, one cannot forget that the insurance company or its attorneys could have filed for a hearing as early as 1983 or early 1984 if the matter was not progressing to the point of speedy resolution. The defense interpretation, accepted by the Industrial Commission, gives the insurance company no incentive to investigate and resolve the issue because, after all, why kick a sleeping dog and possibly provoke a PPI claim that Broadbent might otherwise forget to file, particularly if there is no interest penalty. Therefore, the employer and his insurance cohorts can let the matter linger on for years, like they did here, all the while using, investing and presumably making interest on Broadbent's money. When Broadbent finally gets counsel that brings the matter to a head, and a hearing, the insurance company can claim that it was Broadbent's fault. Under the Commission's erroneous interpretation, it would only pay Broadbent interest from the day of the hearing, even though it has used Broadbent's money for the intervening years. This is unjust. It will lead to great mischief.

In the case sub judice, it is undisputed that Broadbent was injured on October 6, 1982. It is undisputed he received a release to return to work on June 9, 1983 and defendants paid his TTD through June 9, 1983. For a variety of reasons which include employer delay, it has taken years for a final determination of PPI and an award to be made. Lastly, it is undisputed that Broadbent has a twenty-three percent (23%) impairment rating "due to [sic] industrial accident." (R. 56) Therefore, interest is due on all

benefits from June 10, 1983.

POINT II

INDUSTRIAL INDEMNITY, THE EMPLOYER'S INSURANCE CARRIER, MADE NO TENDER OF THE AMOUNT OWED TO MR. BROADBENT UNTIL AUGUST 17, 1992, WHEN THE AWARD WAS FINALLY PAID. SINCE THE AMOUNT OF PERMANENT PARTIAL IMPAIRMENT DUE MR. BROADBENT WAS FAIRLY DISPUTED UNTIL A MEDICAL PANEL RESOLVED THE ISSUE IN 1991, AND SINCE THE EMPLOYER MADE NO TENDER BEFORE THAT TIME, INTEREST IS DUE BROADBENT FROM THE DAY AFTER HIS TEMPORARY TOTAL DISABILITY BEGAN, PURSUANT TO STATUTE AND A RULE OF THE INDUSTRIAL COMMISSION.

It is well established law in Utah that tender of an amount in dispute arrests the accrual of interest, if the rightful tender is not accepted. However, the tender, in order to stop the running of interest, must be made for the full amount owed and without conditions. Sieverts v. White, 2 Utah 2d 351, 273 P.2d 974 (1954). This rule is also applied to the arresting of interest on judgments. 86 C.J.S., tender, §32(c), page 575.

In the case sub judica, the medical panel determined that Broadbent was entitled to a PPI award of twenty-three (23%) percent. The statute provides that that award takes effect when TTD payments terminate. From the termination of TTD on June 9, 1983, until approximately August 17, 1992, (the date of payment), there was never a defense tender of the full amount owed. There was an offer for less than the full amount owed, but that doesn't satisfy the requirements of the tender.

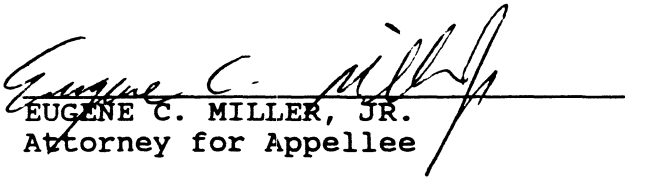
The insurance company's perfidious attitude in this case is amply demonstrated by the fact that the ALJ entered his 23% award on March 9, 1992. The insurance company did not make payment on that order until August 17, 1992, or 161 days after the award was made. Such conduct by the insurance company hardly constitutes a good faith tender that would arrest the accrual of interest, even in part.

CONCLUSION

This court should reverse the Commission and find that Broadbent is entitled to interest from June 10, 1983. Otherwise Broadbent would be subsidizing the insurance carrier, contrary to the well established law of Utah.

RESPECTFULLY SUBMITTED this 23rd day of September, 1992.

SYKES & VILOS, P.C.



EUGENE C. MILLER, JR.
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered, 4 true and correct copies of the foregoing Brief of Appellant to the attorneys at the address listed below, on the 23rd day of September, 1992.

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ATTACHMENT "A"

Medical Panel Report

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December 10, 1991

Timothy C. Allen
Administrative Law Judge
State of Utah
Industrial Commission of Utah
Adjudication Division
160 East 300 South
P.O. Box 510250
Salt Lake City, Utah 84151-0250

Re: Fred Broadbent
DOI: 10-6-82
Emp: Tolboe Construction Company

Dear Judge Allen:

A Panel consisting of Gerald R. Moress, M.D., Neurologist, and Wallace E. Hess, M.D., Orthopaedist, performed a Panel evaluation on Mr. Broadbent. The only x-rays available to the Panel were x-rays from Dr. Jarvis in 1983, cervical and dorsal. Complete spine x-rays and right shoulder x-rays were taken today to aid the Panel in its evaluation.

HISTORY OF INDUSTRIAL INJURY:

10/6/82, while wearing a hard hat, Mr. Broadbent, then age 42,

fell approximately 35 feet down an air shaft. During the fall a 1/2 foot piece of pipe penetrated his rectum. He said that he fell on his head and right shoulder. According to the Utah Valley Hospital Emergency Room record, there was no loss of consciousness. When seen in the emergency room he had contusions and abrasions of the right side of the face, shoulder. His actual complaints in the emergency room were pain in the right shoulder. The admitting neurological examination was normal. Perianal sensation was normal. He was admitted under the care of surgeon, Richard Thomas. During the hospitalization the perineum was debrided and pieces of the coccyx and sacrum were excised. A diverting sigmoid colostomy was performed. He was seen by neurosurgeon, Douglas Kirkpatrick. Studies of his neck showed a fracture at the spinous process of C5. Tomogram of the cervical spine showed just the spinous fracture though a very mild compression fracture with rounding off of the anterior superior corner of C5 body was described. He was discharged on 10/18/82 and then readmitted by Dr. Thomas on 11/18/82 at which time the colostomy was closed.

A follow up neurosurgical visit was paid to Dr. Kirkpatrick on 2/2/83. Dr. Kirkpatrick said that he had seen Mr. Broadbent initially in the hospital because of hand numbness. He reiterated the history of his injury and said that when he had fallen he had hit his hip, shoulder and forehead. Numbness in the ring and little fingers of both hands had dissipated. The doctor diagnosed at the time of the injury cord contusion, concussion, C8 radiculopathy which will improve him. Conservative care was recommended without surgery. He had returned to Dr. Kirkpatrick because of shock like feelings down his body whenever he flexed his neck. These were from the mid chest to his knees. Bowel, bladder and sexual functions were normal. He had some neck pain with

rotation and some numbness into the fingers of both hands. The doctor diagnosed cervical disc and spine injury with intermittent myelopathy. A cervical myelogram was recommended. The patient demurred.

Beginning in 1983 Mr. Broadbent started to see chiropractor, Kelly Jarvis, whom he had seen previously and continues to see for chiropractic treatments.

In February of 1983 Mr. Broadbent referred himself to neurosurgeon, Bruce Sorensen, who did numerous studies including cervical myelogram, head CT scan and eventually MRI scan of the brain and cervical spine. In fact, Dr. Sorensen admitted him to LDS Hospital in 1983 then again in 1987, both times for myelography. The cervical myelogram in February of 1987 showed that at C5-6 there had been a bulging that had taken place since the previous 1983 examination and probably represented a central herniation. The canal was described as being large with a great deal of room around the cord. At L4-5 a bulging disc was described. The brain MRI was normal. When admitted in 1987 by Dr. Sorensen he was complaining of some weakness of his left arm, vague left leg difficulties, as well. Dr. Sorensen felt the myelography did not count for his symptomatology.

Mr. Broadbent was seen again by Dr. Kirkpatrick in April of 1984 for a disability rating. He was most concerned about the electrical shock feeling he was getting in his neck when he flexed, the so called Lhermitte's sign. He was able to return to work in July of 1983. He was also complaining of weakness and numbness of his arms. Clonus of his left index finger was described, decreased strength in the left triceps and biceps. He had generalized numbness. He still had aching in his neck. Some weakness of the upper extremities was found. Sensation

was normal except for numbness in the right thumb and middle fingers. His gait and stance were normal. He reviewed myelogram that he felt was significant showing narrowing at C5-6. He diagnosed C5-6 disc injury with spondylosis and myelopathy, C6-7 disc disease and spondylosis and gave him a 20% impairment rating. He recommended cervical surgery. He returned to Dr. Kirkpatrick in July of 1984 because he said he was worse, burning in his neck, intrascapular region, down the back of both of his arms, clonus of the left index finger was again described, cervical range of motion was diminished. His gait and station were normal. he was admitted 8/14/84 to Utah Valley Hospital and underwent complete myelography that showed a disc bulge at C5-6. There was a difference of opinion between Dr. Kirkpatrick's interpretation of the study and that of the radiologist. The radiologist felt that it was not a significant finding and Dr. Kirkpatrick thought it was more significant. The patient did not want to have any surgery done. On 5/9/84 Dr. Kirkpatrick noted that diffuse weakness was difficult to pin down and now gave him an impairment rating of 5%.

In May of 1988 a Work Capacity Evaluation was performed that indicated that his physical manpower characteristic work level were medium. It was felt that he was feasible for employment.

Neurological evaluation was performed by Alvin Wirthlin on 4/8/86. The doctor saw him specifically because of loss of control of the left arm and leg over the prior 6 to 8 months. He had evidence of akinesia, mild mask faces, increased tone in the left arm, he had a slow gait with shortened steps and no arm swing on the left. The doctor diagnosed hemiparkinsonism. Dr. Wirthlin continued to follow him through October of 1988. In April of 1986 Dr. Wirthlin made mention that the relationship between the trauma and the

Parkinsonism was "fortuitous occurrence." A repeat MRI cervical showed degenerative disc disease C5-6, C6-7 with narrowing of the spinal canal at that level due to osteophytes and ligamentous hypertrophy. The patient was placed on Sinemet which did not cause and change in his condition. At a time he felt possibly he had more spasticity than rigidity and then developed what was felt to be some functional findings on the left side. In October of 1988 he was noted to have extrapyramidal findings with infrequent blinking and increased tone on the left side more than the right, gait disturbance. Nerve conduction studies of the upper and lower extremities were normal.

Neurological evaluation was performed by neurologist, Richard Barringer, University Medical Center, 3/9/89. The doctor felt that he had typical features of Parkinson's Disease, more marked on the left than the right. He could not explain the failure to respond to Sinemet. Another trial on Sinemet was carried out and, again, he had no response. The possibility of one of the Parkinson Plus Syndromes was considered but felt to be unlikely. Dr. Barringer felt this was Parkinson's Disease. On 7/30/89 Dr. Barringer mentioned that the cause of the disorder was questionable and he could not exclude the possibility that it might be related to a fall that he suffered.

Dr. Robert Feldman's evaluation from Neurological Referral Center, Inc. in Boston was reviewed a letter to Dr. Barringer from Dr. Feldman dated 9/13/91. Dr. Feldman noted that at the time of the injury he had a scalp laceration but no penetration to the skull and was not unconscious. He mentioned tremor of the left index finger that Mr. Broadbent said began during the hospitalization. His letter mentions the medication program on which he started Mr. Broadbent which

included the current Eldepryl and Sinemet CR.

IME from physiatrist, Richard Thomas, February of 1988. He gave him an 8% rating for his loss of cervical motion, 2% for loss of lumbosacral motion plus 5% for his coccygectomy for a total of 15% impairment.

Physiatrist, John Bender, performed an IME on 9/18/90. He gave him 15% loss for lumbosacral loss of range of motion, 7% for loss of cervical range of motion, 5% for the coccygectomy and 12% for the impairments related to his Parkinson's like picture. This combined to a total of 34%.

Orthopaedist, Douglas Scow, saw Mr. Broadbent for right shoulder pain in 1983. He felt he had a contusion strain of the right shoulder and trapezius muscle without consequence.

PRIOR SPINE COMPLAINTS:

Mr. Broadbent had been seen by chiropractor, Kelley Jarvis, since 1979, and also by chiropractor Gordon McClean in Provo. Dr. McClean had seen him since 1977 for an industrial accident and Dr. Jarvis from 1979 for problems in the spine, mostly mid thoracic and lumbar. He continues to see Dr. Jarvis about every 3 weeks for an adjustment. He feels that the adjustments last for about 2 to 3 weeks and decreases his pain by about 50% predominantly in his low back.

CURRENT COMPLAINTS:

He has a left hand tremor that involves minimally the left leg. On a bad day he is quite shaky and his left side gets quite rigid. He has increased fatigue. His left arm and left

leg are weak which he blames on the injury. Functionally he can tie his laces but it is somewhat difficult. He dresses slowly. He can button fairly well. He can shave without a problem. He can slowly get out of a chair but this problem is due to his back pain and not so much, he feels, his Parkinson's Disease. He can brush his teeth slowly. He has no problem with eating. His writing is fine. His voice quality is adequate. Walking up stairs is a problem only due to low back pain. Walking also is only limited by low back pain. Bowel, bladder and sexual function are normal. He feels he is progressively getting worse. He feels that the Sinemet helps only a stress like feeling in his body. NECK: Stiff and he has limited turning. He has intermittent pain with activity. Frequent extension and flexion will aggravate this problem. He has no problems in the dorsal spine. SHOULDERS: He has spasms under the shoulder blades. DORSAL: He has pain in that area in the low dorsal region when he leans forward. He has a constant aching anywhere from a 3 to a 7. LOW BACK PAIN: He has continuous stiffness in his low back anywhere between a 5 to a 9 intensity and aggravated by lifting. He sees Dr. Jarvis every 3 to 4 weeks who relieves his low back pain to some degree. He has some tingling down his legs and buttock pain. It is painful for him to sit on his tail bone which was injured at the time of the accident. He feels that his left upper extremity is 50% to 75% weaker and his left lower extremity is 40 to 60% weaker. He has no loss of feeling. He continues to have the Lhermitte's sign with tingling down his anterior torso and both lower extremities and toes when he flexes his neck. This has not changed since the injury.

HOBBIES:

Horse back riding, hunting and fishing.

SOCIAL HISTORY:
Married, 2 dependent children at home.

WORK HISTORY:
He returned to work 9 months after the accident. He is currently working for Summit county as a building inspector and has been doing this for 2 and 1/2 years. This job has worked out quite well.

LEGAL MATTERS:
He is represented in this industrial accident matter by Attorney, Gene Miller.

EDUCATION:
Two quarters at the University of Utah. He has done construction work all of his life.

MILITARY HISTORY:
Two years in the Army.

HABITS:
Alcohol, tobacco denied.

EXAMINATION:
On general inspection he walked with a mildly festinating gait without arm swing and slightly stooped. He had a mask like faces. 6'3", 190 pounds, right handed.

GENERAL EXAMINATION:
On general examination lungs: clear, heart: no murmurs. Blood pressure 150/106 right arm.

CRANIAL NERVE EXAMINATION:
Cranial nerves showed full extra-ocular movements and a mild

snout reflex. The cranial nerves were otherwise unremarkable.

MOTOR:

Tone was increased in both flexion and extension in all extremities, more so in the left upper and left lower extremity. He had mild cogwheeling of the left upper extremity. Reflexes were 3+ and equal throughout. His plantar reflexes were down going. Strength: he had give way strength in the left upper and left lower extremity anywhere between a 3 to 4/5 loss of function diffusely.

SENSORY:

Intact to pinprick throughout.

CEREBELLAR:

He had a negative head tremor. He had a mild Parkinsonian tremor involving the left upper and left lower extremity, especially the former. Finer to nose was done slowly but accurately as well as heel to shin. He had difficulty with repetitive movements, especially in the left hand. His handwriting was micrographic.

SHOULDERS:

There was elevation of the proximal clavicle at the right SC joint. He is also tender of the right acromion . Shoulder rnage of motion was normal.

EXTREMITIES:

CIRCUMFERENCES:

	RIGHT	LEFT
UPPER ARMS	12	11
FOREARMS	11 3/4	11 1/4
THIGHS	19 1/2	20
FORELEGS	15	15

SPINE:
Axial loading caused no pain

CERVICAL SPINE:
He was 1+ tender C1 through C7 and over the right superior trapezius muscle. The muscles were supple.

RANGE OF MOTION:
Right rotation: 45°, left rotation: 45°, flexion: 35°, extension: 35°, left and right lateral flexion: 25°.

DORSAL SPINE:
Nontender. There was mild tenderness over the right rhomboid, 35° of right and left rotation.

LUMBOSACRAL SPINE AND COCCYX:
He was tender over L5 and over the stump of the sacrum where there was a hollowed area and a well healed midline surgical incision.

WEIGHT BEARING:
Heel toe: normal right, left: poor.

SQUAT:

Half squat with difficulty.

LUMBOSACRAL RANGE OF MOTION:
Right: 30°, left: 30°, flexion: 20/14, extension: 15/0.

STRAIGHT LEG RAISING:
Limited only by tight hamstrings at 45° bilaterally.

HIPS:
Full flexion and external and internal rotation.

LEG LENGTHS:
Equal.

X-RAYS:
CERVICAL: Showed mild spondylitic changes as described in the enclosed report, DORSAL: normal, LUMBOSACRAL: disc space, narrowing L5-S1 with spur formation. See enclosed report. RIGHT SHOULDER: Normal. Normal SC joint.

ASSESSMENT:
Mr. Broadbent suffered a significant industrial injury in October of 1982. The major trauma sustained was, of course, to his rectum and peroneal area requiring a temporary colostomy. His coccyx was shattered and was resected. He has been left with no difficulties with bowel, bladder or sexual function. He does have some residual pain over the resected bony stump. Additionally, he has ongoing pain in the spine, cervical through lumbar. Radiographically, we were able to identify mild spondylosis of the cervical region and moderate in the lumbosacral region which has developed over the past 9 years following his injury. He did have problems in his spine prior to the injury and we had documentation of prior chiropractic visits. It appears that the injury has

aggravated that problem.

The major area of concern here is that of the neurological consequence of his injury. Though he continues to have what is called a Lhermitte's sign which is the tingling down the torso into his legs, flexion of the neck an identifying source for that problem has never been discovered despite multiple cervical MRIs and myelograms. In itself, that does not cause a functional loss but is a sign of usual cervical cord injury which we have not been able to identify. The causal relationship to the accident appears evident, though. An impairment would not issue from that neurological sign. He has developed a form of Parkinson's Disease which has been refractory to the drugs commonly used to treat this condition. There is no reason to suspect that the trauma that he sustained in his industrial injury has any bearing on his Parkinson's features. Parkinson's Disease may issue from causes other than idiopathic including drug induced, chemical exposures such as carbon monoxide and presumably also in rare conditions after severe head injury. We do not have evidence here of any severe head injury. He had a bump on his head but without loss of consciousness. The Panel feels that it would be begging ones credibility to indict his Parkinson's being due to his industrial accident. Mr. Broadbent feels that there is a definite relationship because he feels that his symptomatology of the disease began temporally with the injury. That may be so, however, the Panel feels that the production of the symptomatology and the injury remains coincidental and not causal.

In terms of reasonable medical probability the Panel finds that:

1) The Parkinson's Disease was not the result of the industrial

accident of 10/6/82.

2) Permanent impairment due ot industrial accident, pre-existing conditions and permanent aggravation of pre-existing conditions:

	PRE-EXISTING 1982 ACCIDENT	AGGRAVATION DUE TO 1982 ACCIDENT	TOTAL
CERVICAL SPONDYLOSIS WITH DECREASED ROM*	0	10%	10%
LUMBAR SPONDYLOSIS WITH DECREASED ROM*	3%	7%	10%
COCCYGECTOMY		5%	5%
COMBINED	3%	21%	23%

*Some loss of ROM is due to underlying Parkinson. Therefore, not all loss assigned to the spondylosis.

Sincerely,

Gerald R. Moress, M.D., P.C.

Wallace E. Hess, M.D.

GRM/jbl
Tx: 12/16/91

ATTACHMENT "B"

Order, Administrative Law Judge

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 90000918

FRED BROADBENT, Applicant, vs. TOLBOE CONSTRUCTION and/or INDUSTRIAL INDEMNITY, EMPLOYERS REINSURANCE FUND, Defendants.	*	ORDER

At the time and place set for the hearing in this matter, it was stipulated by the parties that the matters in dispute were medical only and were not factual, and as such would not require an evidentiary hearing. In addition, the parties, by and through counsel, agreed that the medical issues could be referred directly to the Medical Panel for its evaluation.

The file and the applicant were referred to the Medical Panel for its evaluation. The Panel Report was received and copies were distributed to the parties. Fifteen(15) days having elapsed since the mailing of said Medical Panel Report, and no objections having been received thereto, the Panel Report is hereby admitted into evidence.

The Medical Panel found that the applicant has sustained a 23% impairment of the whole person on a combined basis due to the industrial accident and the aggravation of a pre-existing condition. The Administrative Law Judge hereby adopts the findings of the Panel as his own. Pursuant to section 35-1-69 the applicant shall be entitled to a 20% award from the employer's carrier and shall receive a 3% impairment from the Employers Reinsurance Fund. In addition, the carrier, Industrial Indemnity shall be entitled to reimbursement from the ERF for 3/23 or 13% of the medical expenses and temporary total disability paid by them on behalf of the applicant as the result of the industrial accident of October 6, 1982.

On the date of his industrial accident the applicant was earning wages sufficient to entitle him to the maximum award for permanent partial impairment of $189 per week. Therefore, the applicant is entitled to an award from the of $189 per week for 62.4 weeks for a total of $11,793.60 in a lump sum plus interest of 8% per annum from December 23, 1991. The ERF shall pay the applicant an award of 9.36 weeks at the rate of $189 per week for a total of $1,769.04 in a lump sum with 8% interest from December 23, 1991.

The applicant has had the benefit of legal counsel in this matter and counsel is entitled to a fee of $2,713, which shall be deducted from the applicant's award.

ORDER:

IT IS THEREFORE ORDERED that Industrial Indemnity pay Fred Broadbent compensation at the rate of $189 per week for 62.4 weeks for a total of $11,793.60 as compensation for a 20% impairment of the person due to the industrial accident of October 6, 1982. These benefits shall be paid in a lump sum with 8% interest from December 23, 1991.

IT IS FURTHER ORDERED that Industrial Indemnity pay Eugene C. Miller, Jr., Attorney for applicant, the sum of $2,713 for services rendered in this matter, the same to be deducted from the aforesaid award to the applicant and remitted directly to his office.

IT IS FURTHER ORDERED that Industrial Indemnity shall be entitled to reimbursement from the ERF for 13% of the ttd and medical expenses paid by them on behalf of the applicant as the result of the industrial accident. Said reimbursement to be had uupon the submission of a verified petition setting forth the amounts so expended.

IT IS FURTHER ORDERED that the ERF pay Fred Broadbent compensation at the rate of $189 per week for 9.36 weeks for a total of $1,769.04 for a 3% permanent partial impairment due to pre-existing conditions. These benefits shall be paid in a lump sum with 8% interest from December 23, 1991.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and , unless so filed, this Order shall be final and not subject to review or appeal.

Timothy C. Allen
Presiding Law Judge

Certified this
9th day of March, 1992.

ATTEST:

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I certify that on March 9, 1992, a copy of the attached Order in the case of Fred Broadbent was mailed to the following persons at the following addresses, postage paid:

Fred Broadbent
2774 E. 1200 So.
Heber City, Utah 84032

Eugene C. Miller, Jr.
Attorney
311 So. State, #240
SLC, Utah 84111

Stuart Poelman, Esq.
P.O. 45000
SLC, Utah 84145

Erie Boorman, Esq.
ERF

INDUSTRIAL COMMISSION OF UTAH

Tim Allen

ATTACHMENT "C"

Denial of Respondent's Motion for Review and Denial of Applicant's Motions for Review in Part

JUN 0 1 1992

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY UT 84114-6600

Fred Broadbent,	*	
	*	DENIAL OF RESPONDENT'S
Applicant,	*	MOTION FOR REVIEW AND
vs.	*	DENIAL OF APPLICANT'S
	*	MOTIONS FOR REVIEW
	*	IN PART
Tolboe Construction and/or	*	
Industrial Indemnity,	*	Case No. 90000918
Employers' Reinsurance Fund,	*	
Respondent.	*	

****

The Industrial Commission of Utah reviews the Motions for Review of applicant Fred Broadbent and respondents Tolboe Construction and Industrial Indemnity in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant and the respondents Tolboe Construction and/or Industrial Indemnity submitted Motions for Review of the administrative law judge's (ALJ) decision in the above captioned case. The applicant submitted two Motions for Review of the ALJ's decision of March 9, 1992, one on March 18, 1992, and the second one on April 6, 1992. Both were timely filed.

The above named respondents submitted their response to applicant's first motion on April 8, 1992, and also, on that date timely submitted their Motion for Review. On April 20, 1992, the applicant responded to respondent's April 8, 1992 reply to applicant's Motion for Review, and on April 24, 1992 responded to respondent's Motion for Review. Respondents provided a further reply on May 12, 1992 to applicant's Motion for Review of April 6, 1992.

All parties need to be aware that responses to motions for review must be filed with the Commission within 15 days of the mailing date of the motion for review, or such responses may be considered untimely. U.C.A. Section 63-46b-12 (1953 as amended 1988). Since there were untimely responses from all parties, and because we have received no objections to the untimely filings, we will consider the responses.

Relevant facts are as follows. The applicant sustained an industrial accident on October 6, 1982. Tolboe Construction and Industrial Indemnity paid medical expenses and temporary total disability benefits (TTD). The respondents claim that the applicant refused tender of payment for permanent partial disability (PPD) due to a disagreement as to the correct PPD

rating. The tender was made on June 4, 1987. The applicant filed an application for hearing in October 1990.

In answer to the hearing application, respondents denied liability for PPD compensation asserting that the Industrial Commission of Utah (IC) is precluded from making a PPD award at any time subsequent to eight years after the date of the accident, and basing this assertion on U.C.A. Section 35-1-66. By order dated March 9, 1992, the ALJ awarded the applicant PPD benefits, but did not address the eight year limitation provision contained in the statute.

Because of a series of disputes between the parties, and among the physicians, as to the proper PPD rating, the ALJ referred this case to a medical panel. On December 10, 1991, the panel awarded the applicant a 23 percent impairment rating. The ALJ adopted the medical panel impairment rating of 23 percent, and ordered that the applicant's compensation be paid in a lump sum plus interest of eight percent from December 23, 1991.

The only issue raised in applicant's Motion for Review dated March 18, 1992 was whether the date of December 23, 1991 was the proper date for the interest to begin accrual. The applicant contends that interest should begin on June 9, 1983 which is the day after the date upon which the applicant's TTD was terminated. Alternatively, the applicant argues that if the Commission decides that the interest should not begin on that date, the interest clearly should begin on April 23, 1984 which is the date that the applicant met the standard for a permanent partial impairment rating of 20 percent.

The respondents argue that the ALJ was correct in ordering that interest on the PPD award commenced on December 23, 1991 since that was the date that the liability of the respondents was first medically determined. We agree with the respondents on this issue.

The Utah Supreme Court has discussed the rationale behind the award of interest on workers compensation benefits:

> Thus, it is clear that compensation for worker disability is legislation for the public welfare. It is also clear that the statute providing for interest on unpaid benefits was a legislative attempt to remedy a serious social problem: the depreciation of the value of benefits as a result of non-receipt of the weekly benefit for months, or perhaps years, until a final determination of eligibility and an award

was made.

Marshall v. Ind. Comm'n, 704 P.2d 581, 583 (Utah 1985).

U.C.A. Section 35-1-78 provides in pertinent part:

> Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

1953 as amended 1981.

Further, our rules state that:

> For the purpose of interest calculation, benefits shall become "due and payable" (as used in Section 35-1-78, U.C.A.) as follows:
>
> * * *
>
> 2. Permanent partial compensation shall be due and payable on the next day following the termination of a temporary total disability. However, where the condition is not fixed for rating purposes, the interest shall commence from the date the permanent partial impairment can be medically determined.

Emphasis added; Rule 490-1-12 (Utah Admin. Code 1991).

There has been no allegation by the applicant of bad faith or dilatory tactics on the part of the respondents in paying the interest. Our decision on the award of interest may be different in cases where the employer cannot show that it proceeded with some dispatch to provide payments to injured employees who were entitled to such payments.

Under the circumstances, interest accrues from the date of December 23, 1991 as correctly determined by the ALJ.

The applicant in his Motion for Review dated April 6, 1992 also argues that he has never received reimbursement for his travel. The ALJ Order is silent as to this issue, and the respondents' reply to applicant's motion argues that the Order did not contain any consideration of the mileage claim because the applicant did not submit itemized information reflecting the particular amounts of mileage expense claimed for the various periods involved to the ALJ as the ALJ had ordered. The applicant

has not responded to this allegation of respondents so we will treat this statement by the respondents as true for purpose of our decision.

The current pertinent rule which was effective on March 16, 192 provides that:

> An employee who, based upon his/her physician's advice, requires hospital, medical, surgical, or consultant services for injuries arising out of and in the course of employment and who is authorized by the self-insurer, the carrier, or the Industrial Commission to obtain such services from a physician and or hospital shall be entitled to [certain reimbursements].

R568-2-19A (Utah Admin. Code 1992).

The rule further provides that "[r]equests for travel reimbursement must be submitted to the carrier for payment within one year of the authorized care. R568-2-19B4 (Utah Admin. Code 1992). Therefore, such mileage reimbursement requests are authorized under the current rule as an expense which can be passed on to the carrier or employer unless the employee does not submit such request for reimbursement within one year of the authorized care.

The applicant does not fall under the current rule since he was injured in 1982, and since he clearly filed his application before the effective date of the new rule. Therefore, the requirement that the applicant submit his requests for travel reimbursement to the carrier within one year of the authorized care will apply in his case only to those medical treatments, and other circumstances within the mileage reimbursement rule which were incurred subsequent to March 15, 1992.

Carriers should not impose rigid and onerous requirements on injured employees to prove mileage expenses. Such requirements are contrary to the spirit of the Workers' Compensation Act. However, the carrier may reasonably require the injured employee to show that he/she attended a medical appointment or other required treatment along with a statement from the injured employee showing the mileage from the home/work of the employee to the place of treatment and return.

Rather than the carrier simply stating that the burden has not been met, it is incumbent upon the carrier to tell the employee

precisely what will be reasonably needed to substantiate the reimbursement. Preferably this should be discussed, among such items as how the claim will be processed, early in the process when the carrier assigns an adjuster to the case. Such a discussion will avoid much of the contention presented by arguments over mileage as presented in this case.

We do not have sufficient information on which to approve or disapprove applicant's claim for mileage in this case. The applicant has provided us with a list of the mileage amounts claimed for the various years. Had the applicant provided this list more punctually, it could have been considered by the ALJ. However, in the interest of conserving time, we will dispose of this issue.

The carrier must do more than say that the amounts are old and unsubstantiated. The applicant has listed the day, month, and year for most of his trips, the medical practitioner or facility visited, and the number of miles. The carrier presumably has the medical records and bills which it paid to verify these trips. It would seem that sufficient information has been provided on which the carrier can determine the claim. Since the applicant was late turning in his claim, the carrier will have ten days from the issuance of our order in which to provide us more information about its specific objections, and about what it needs in the way of substantiation which are not within its records of the case, or we will approve the amounts claimed.

The remaining issue to be discussed, and which is the only issue raised by the respondents in their Motion for Review is whether U.C.A. Section 35-1-66 of the Utah Workers' Compensation Act prohibits the Commission from making an award to the applicant of permanent partial disability after eight years from the date of applicant's injury.

The statute in question reads:

> **The Commission may make a permanent partial disability award at any time prior to eight years after the date of injury to an employee whose physical condition resulting from such injury <u>is not finally healed and fixed</u> eight years after the date of the injury and who files an application for such purpose prior to the expiration of such eight-year period.**

Emphasis added. (1953 as amended 1981).

The ALJ Issued his decision more than nine years after the

date of injury. This precludes the Commission from ordering the respondents to pay an award of permanent partial disability to the applicant argue the respondents. To buttress this argument, the respondents further contend that the delay in seeking the Commission's award was caused by the applicant.

The use of the word "may" clearly shows that the Commission is not required to make such award within the eight year period, although it may do so. This particular statute is applicable to those situations where the applicant's condition has not stabilized, but the applicant desires that his medical condition be rated even though under normal circumstances no rating would be provided until stabilization. Under these circumstances, such applicant can force a rating if requested prior to the expiration of the eight year period.

In this case, the applicant clearly filed his application before the eight year period.

For these reasons, the Commission affirms the ALJ's decision. There is substantial evidence in light of the entire record to uphold the findings of the ALJ, and his conclusions of law are appropriate under the circumstances.

ORDER:

IT IS ORDERED that the order of the administrative law judge dated March 9, 1992 is affirmed.

FURTHER, IT IS ORDERED that the respondents shall have ten days from the date of issuance of this Order to provide to the Commission any specific objections to the mileage reimbursement request shown at Exhibit A, Applicant's Motion for Review filed on April 6, 1992. The applicant shall have ten days from the date of service upon him to respond to respondent's objections, if any.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a

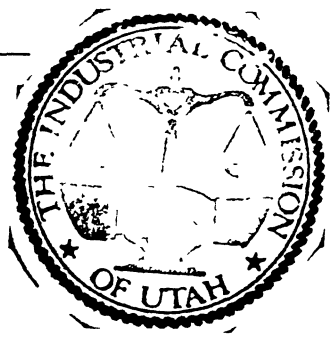
transcript of the hearing for appeals purposes.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Certified this 29th day of May 1992.
ATTEST:

Patricia O. Ashby
Commission Secretary



CERTIFICATE OF SERVICE

I certify that I did mail by prepaid first class postage the DENIAL OF RESPONDENT'S MOTION FOR REVIEW AND DENIAL OF APPLICANT'S MOTIONS FOR REVIEWW IN PART on Fred Broadbent, Case No. 90000918 on 29 May 1992 to the following:

Stuart L. Poelman, Esq.
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Presiding Judge Allen